



August 22, 2016

Accepted / Filed

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

AUG 22 2016

Federal Communications Commission
Office of the Secretary

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143;
Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25;
*AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange
Carrier Rates for Interstate Special Access Services*, RM-10593

DOCKET FILE COPY ORIGINAL

Dear Ms. Dortch:

In accordance with the *Second Protective Order* for the above-referenced proceedings,¹ Windstream Services, LLC ("Windstream") herein submits a redacted version of the attached ex parte filing in the above-referenced proceedings.

Windstream has designated for highly confidential treatment the marked portions of the attached documents pursuant to the *Second Protective Order* in WC Docket No. 05-25 and RM-10593.

Pursuant to the *Second Protective Order*, Windstream is filing a redacted version of the document electronically via ECFS, one copy of the highly confidential version and two copies of the redacted version with the Secretary, and delivering two copies of the highly confidential versions to Marvin Sacks.

* * *

¹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, DA 10-2419, 25 FCC Rcd. 17,725 (Wireline Comp. Bur. 2010).

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Ms. Marlene H. Dortch
August 22, 2016
Page 2 of 2

Please contact me if you have any questions or require any additional information.

Sincerely,



John T. Nakahata
Counsel to Windstream Services, LLC

Attachment

cc:

Pamela Arluk
Irina Asoskov
Justin Faulb
Christopher Koves
Joseph Price
Marvin Sacks
Shane Taylor
David Zesiger



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Dear Ms. Dortch,

On August 18, 2016, Jennie Chandra and Malena Barzilai from Windstream Services, LLC ("Windstream"), and Henry Shi and the undersigned from Harris, Wiltshire & Grannis LLP, met with Commission staff regarding the Further Notice of Proposed Rulemaking in the above-referenced proceedings.¹ The staff attending this meeting were Pamela Arluk, Irina Asoskov, Justin Faulb, Christopher Koves, Joseph Price, Marvin Sacks, Shane Taylor, and David Zesiger, all of the Wireline Competition Bureau.

I. The Commission Should Implement the Compromise Framework Jointly Proposed by Verizon and INCOMPAS by Adopting Specific Reforms That Produce Real and Meaningful Price Reductions and Prevent Backdoor Price Increases.

Windstream reiterated its support of the framework proposed by Verizon and INCOMPAS,² which represents an integrated compromise that reflects a balance among

¹ *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, 31 FCC Rcd. 4723 (2016) ("FNPRM").

² Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Dockets No. 16-143 and 05-25, RM-10593 (filed Aug. 9, 2016) ("August 2016 Verizon-INCOMPAS Letter").

Ms. Marlene H. Dortch
August 22, 2016
Page 2 of 9

competing interests comprised of incumbent LECs, competitive LECs, and wireless carriers.³ The Verizon-INCOMPAS proposal reflects a commitment to achieving real and meaningful price reductions in non-competitive markets and not just “paper gains.”⁴ To effectively implement the price reduction framework, the Commission should adopt clear rules of the road that will promote negotiated resolutions between sellers and buyers of business data services and reduce the need for parties to seek relief through the complaint procedures. Accordingly, Windstream urged the Commission to establish a number of specific rules under the overall Verizon-INCOMPAS framework.

First, to help ensure that the benchmarks are meaningful and not subject to evasion—i.e., to reduce the opportunity for “backdoor” price increases—as the Verizon-INCOMPAS proposal states, the benchmark rate must include “charges for the carrier handoff point to the end user premises.”⁵ As Windstream explained in its Reply Comments and supporting declaration, this includes charges for what is sometimes termed the “Network-to-Network Interfaces,” or “NNI,” which are the connection points where traffic is handed off between the two carriers.⁶ The incremental costs of the NNI (i.e., the interconnection between the networks of the wholesale provider and wholesale purchaser) are minimal to the wholesale provider, on the order of a few percent of the recurring charges for the Ethernet port and the committed information rate of the service, i.e., the bandwidth tier.⁷ Unless the Commission specifies that all charges up to and including the carrier handoff point are part of the benchmark rate, providers could easily continue to raise their rivals’ costs by increasing these charges or inventing new ones altogether.

Of necessity, the benchmark must also delineate between those facilities extension costs that are included in the benchmark (i.e., ordinary construction), and those that are extraordinary (i.e., special construction). Without such a delineation, special construction charges also represent a potential “backdoor” for price increases by the market leader, with the opportunity to require competitors to pay for the installation of facilities that the market leader will also use to compete in the retail market. In Windstream’s experience, market leaders are increasingly imposing inappropriate “special construction” charges even when those providers have existing facilities to the end user premises or can use any facilities constructed to the end user premises

³ See Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking at 7-13, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed Aug. 9, 2016) (“Windstream Aug. 9, 2016 Reply Comments”).

⁴ See August 2016 Verizon-INCOMPAS Letter at 3.

⁵ See *id.*

⁶ See Windstream Aug. 9, 2016 Reply Comments at 36; Declaration of David Schirack, Mike Baer and Samuel Bushey ¶ 14 (“Schirack/Baer/Bushey Declaration”), appended as Attachment C to Windstream August 9, 2016 Reply Comments.

⁷ See Schirack/Baer/Bushey Declaration ¶ 14.

Ms. Marlene H. Dortch
August 22, 2016
Page 3 of 9

for their own retail customers.⁸ As part of its implementation of the Ethernet benchmark, the Commission should adopt Windstream's proposed criteria for determining when such special construction are truly "special" and warranted.⁹ Under these principles, the market leader may impose special construction charges for network build-out only where *both* of the following two conditions are met: Existing facilities, even with routine maintenance and conditioning, do not have capacity available at or above the level requested by the competitive provider; *and* the special construction charges must not address the costs of network delivery infrastructure that the market leader will use for its own operations. The market leader instead should only impose special construction charges where it must deploy new network delivery infrastructure (e.g., conduit, subduct, buried, aerial infrastructure) to fulfill a CLEC's request, and where it certifies that it will not use the infrastructure—including the supporting infrastructure, such as conduits and poles—for any of its or its affiliates' retail services in the future.¹⁰

⁸ See Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking at 72, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed June 28, 2016) ("Windstream June 28, 2016 Comments").

⁹ See *id.* at 72-78. The Commission should also apply the same principles when determining whether special construction charges are warranted for TDM-based services over copper facilities. See *id.*

¹⁰ This market leader certification is consistent with—and, indeed, cannot and should not override—the basic requirement that the ILEC cannot charge for any facilities that it can use to serve other customers. In application, this means the ILEC should not charge special construction for any of the following:

- Construction and interconnection of a link between the GPON ONU and, as applicable, a market leader's serving Ethernet or TDM node;
- Poles that are not limited to the CLEC customer's exclusive future use;
- Any costs for conduit, subduct, buried or aerial infrastructure when
 - o This infrastructure is located in a public right-of-way, except in circumstances where the market leader certifies that it will not have any other future use for the infrastructure (e.g., the infrastructure runs to a single customer at a particular location, and no other customers are located along the route or at the terminus point of the infrastructure); or
 - o The infrastructure traverses private property but will serve a multi-tenant location;
- Fiber or cable that is not limited to the CLEC customer's exclusive future use;
- Any splitters, amplifiers, or other passive infrastructure that have the capability to serve more than the CLEC's customer at the same location or locations that could be served from the same fiber;

Ms. Marlene H. Dortch
August 22, 2016
Page 4 of 9

Moreover, the market leader should not be able to impose unreasonable delays in the special construction process, which in many instances will cause the potential customer to look elsewhere for service.¹¹ To ensure that special construction charges do not significantly harm competitive providers' ability to deploy services to customers, the Commission should require that the ILEC respond to a CLEC's request within five days with an explanation of the basis for its conclusions that special construction is needed (consistent with the tariff) and a detailed cost estimate for the special construction.¹² The ILEC also should be required to submit to a reasonable number of audits per year to ensure that its no-use certifications remain valid.

Second, the Ethernet service level used for purposes of setting the benchmarks rates should be the highest service level offered by the relevant market leader for a switched Ethernet service at or above the bandwidth of a DS1 connection.¹³ Applying the benchmark rate to the highest service level of switched Ethernet service is both appropriate from a technological standpoint and minimizes the administrative burden on the Commission. The highest Ethernet service level is the appropriate tier because it is the closest match to the service level of a DS1 connection, which is a physically dedicated circuit that performs at the highest levels. Moreover, it is administratively simpler to have the benchmark represent the highest quality level offered. Using a lower quality level requires both defining that lower level—which may vary from carrier

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- Any network electronics and/or equipment that have the capability to serve more than the CLEC's customer;
 - Any intra-building cable that could be used to serve more than the CLEC's customer;
 - Power plant augmentation (e.g., battery backup, commercial power feed, rectifiers, uninterruptable power supply) required for electronics that have the capability to serve more than the CLEC's customer; or
 - Labor for which a market leader would derive any benefit other than that needed to fulfill the CLEC's order (for example, an ILEC should not be able to charge all the way from a central office to a building when the bulk of the fiber on the run from a central office to a splice box, or place where a splice box could be placed, will support service to other customers, either at that location or at locations passed en route).

See Windstream June 28, 2016 Comments at 75-77.

- ¹¹ *See Declaration of Christopher Nein ¶ 6, appended as Attachment D to Windstream Aug. 9, 2016 Reply Comments.*
- ¹² This should include information on whether the building already has a GPON and/or Ethernet connection, the specific route designed, labor hours, and associated tasks included in the quotation, and proposed installation location and description of any electronics included in the quotation.
- ¹³ Although the parties did not reach agreement on the specific service level, Verizon and INCOMPAS did agree that the benchmark rate should apply an Ethernet service level that is "closest to TDM-based DS1 special access" service. August 2016 Verizon-INCOMPAS Letter at 2.

Ms. Marlene H. Dortch

August 22, 2016

Page 5 of 9

to carrier—and then establishing the permitted relationship between that lower benchmark level and the higher quality service. Furthermore, to the extent that carriers have reduced costs for lower levels of service quality, they will have an incentive to price those tiers below the benchmark in order to induce customers to purchase the lower service quality levels. In any event, as stated in the Verizon-INCOMPAS letter, the Commission should make clear that rate differences between service quality levels and the benchmark must be reasonable.¹⁴

Third, the Commission should establish benchmark Ethernet rates using the Verizon-INCOMPAS methodology for the most frequently purchased bandwidth tiers offered by the market leader, and the benchmarks should avoid large gaps between benchmarked service levels. For example, if a market leader offers Ethernet services in 100 Mbps increments between 100 Mbps and 1 Gbps, the benchmarks should not be limited to 100 Mbps, 200 Mbps and 1 Gbps, particularly if there are a significant number of retail customers purchasing, for example, 500 Mbps. A large jump between benchmarked bandwidth levels increases the potential for exercise of market power in between the benchmarked levels: While every increment need not be specified, narrowing the gap between benchmarked levels limits the ability to do so.

Fourth, Windstream agrees with the Verizon-INCOMPAS proposal for adopting a “streamlined dispute resolution process that reflects which parties possess necessary information to resolve complaints related to compliance with the benchmarks.”¹⁵ Windstream explained that, in applying this approach, the Commission should in most cases place on the market leader the burden of establishing the reasonableness of rates that exceed the applicable benchmarks, given that the market leader would possess all of the information relevant to the reasonableness determination. Likewise, the market leader should also bear the burden of establishing that rates for lower service levels bear an appropriate relationship to the benchmark rates if, for example, it seeks to charge the same or nearly the same rate as the benchmark rate for a service that has a lower service level than that provided for the highest service level offer by the same market leader. As proposed by Verizon and INCOMPAS, the purchaser should be entitled to pay the benchmark rates pending resolution of any dispute and subject to true-up and interest.¹⁶

II. Market Leaders Should Be Required to Make All Services Available at Wholesale Rates That Are Below Retail Rates.

As detailed in Windstream’s Reply Comments and in the Declaration of Dr. Robert Willig, efficiently priced wholesale access to bottleneck last-mile facilities is essential to competition in non-competitive business data services markets.¹⁷ The Commission has long

¹⁴ *See id.*

¹⁵ *Id.* at 2.

¹⁶ *See id.*

¹⁷ *See* Windstream Aug. 9, 2016 Reply Comments at 24-28; Declaration of Robert D. Willig ¶¶ 24-26, appended as Attachment B to Windstream Aug. 9, 2016 Reply Comments.

Ms. Marlene H. Dortch
August 22, 2016
Page 6 of 9

recognized the important role carrier wholesale access plays in ensuring competition.¹⁸ To protect efficient downstream competition from being eliminated through price squeezes, the Commission should ensure (1) that providers offer wholesale purchasers all services offered to retail purchasers, and (2) that wholesale rates for business data services will be below retail rates offered to end users.

A broad wholesale access rule that applies to all non-competitive retail services is supported by Sections 201 and 202, and Section 251 of the Communications Act.¹⁹ The Commission's orders have repeatedly made clear that discrimination against carrier customers violates Sections 201(b) and 202(a)'s prohibitions against unjust and unreasonable discrimination and practices.²⁰ In addition, Sections 251(b)(1) and 251(c)(4) specifically require ILECs to provide their retail telecommunications services to other telecommunications carriers at wholesale.²¹ Citing both Sections 251(b)(1) and 251(c)(4), the United States Supreme Court stated that the Communications Act of 1996 fosters competition through, among other means, the competitive resale of telecommunications service, "which the incumbent [LEC] has a duty to sell at wholesale."²² The Commission adopted a similar principle in the *Emerging Wireline Order* for purposes of determining the availability of reasonably comparable wholesale access following of the transition from TDM-based to IP-based services. There, the Commission considered whether "wholesale bandwidth options include the same services retail business service customers receive."²³ The same approach would be appropriate for the Ethernet

¹⁸ See, e.g., *AT&T Communications Apparent Liability for Forfeiture and Order to Show Cause*, Notice of Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359, 10 FCC Rcd. 1664, 1664 ¶ 2 (1994) ("[U]nlimited resale promotes the public interest by creating competitive pressures on carriers . . . and by stimulating demand for such service.").

¹⁹ See 47 U.S.C. §§ 201(b), 202(a), 251(b)(1), 251(c)(4).

²⁰ See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, FCC 01-98, 16 FCC Rcd. 7418, 7446 ¶ 46 (2001) ("[T]he Commission's Title II resale requirements mandate that wireline common carriers provide telecommunication services to competitors."); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, FCC 80-607, 83 FCC 2d 167, 168 ¶ 1 (1980) ("[R]estrictions of any kind on the resale and sharing of domestic public switched network services are unjust, unreasonable, and unreasonably discriminatory, and hence unlawful under Sections 201(b) and 202(a) of the Communications Act.").

²¹ See 47 U.S.C. §§ 251(b)(1), 251(c)(4).

²² *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002).

²³ *Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, 30 FCC

Ms. Marlene H. Dortch
August 22, 2016
Page 7 of 9

benchmark to ensure that wholesale customers are not presented with a significantly more limited set of options.

The wholesale rates for inputs should reflect the significantly lower costs market leaders incur in providing these inputs to wholesale customers as compared to providing finished retail communications solutions that utilize those inputs to serve their retail customers.²⁴ As Dr. Willig explained in his declaration, the Commission should use the best evidence available to it to approximate the efficient wholesale price that would spur downstream competition and investment by efficient competitive providers and the market leader.²⁵ The wholesale price can be approximated by removing from the retail price those costs that are not incurred by the wholesale provider, including the costs of retail sales and of network resources that are being provided by the wholesale customer in assembling the finished communications solution.²⁶ Accordingly, the Commission should establish as a backstop rule that wholesale prices should be lower than retail prices by at least an amount equal to the percentage that the market leader offers its third-party sales agents and channel partners as commission for retail enterprise customers' services. Based on Windstream's own experience, which it believes is consistent with industry practice, a reasonable approximation of just the avoided retail sales cost is the percentage commission paid to third-party sales agents, which is around *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY CONFIDENTIAL*****²⁷

III. Reform to TDM-Based Special Access Pricing and the Elimination of Unreasonable Shortfall Penalties Remain Crucial to Competition in the Business Data Services Markets.

Windstream also urged the Commission to act on reforming rules applicable to TDM-based DS1 and DS3 special access services, which remain critical inputs for competitive providers of business data services. First, the Commission should make clear that any rate reduction for DS1 and DS3 services must be applied to existing contract tariffs and/or commercial agreements that wholesale customers have entered into with price cap carriers, net of all applicable volume and term discounts. Otherwise, the reductions could become mere "paper gains" if the price cap carriers can simply eliminate existing discounts to offset the reductions mandated by the Commission.

Rcd. 9372, 954 ¶ 147 (2015) (citing letters from business data services customers describing the benefits of more choices of service options offered by competitive providers).

²⁴ See Windstream Aug. 9, 2016 Reply Comments at 34-37; Schirack/Baer/Bushey Declaration ¶¶ 10-11.

²⁵ See Willig Declaration ¶¶ 26, 30.

²⁶ See *id.* ¶¶ 29-32.

²⁷ See Declaration of David Schirack and Mike Baer ¶¶ 5-7, appended as Attachment A to Windstream June 28, 2016 Comments.

Ms. Marlene H. Dortch
August 22, 2016
Page 8 of 9

Second, Windstream reiterated the importance of additional Commission action to eliminate shortfall penalties imposed on competitive providers that migrate from TDM-based special access circuits to Ethernet. As Windstream has previously noted, certain large ILEC tariffed commitment plans impose punitive shortfall charges if a wholesale customer fails to meet the minimum committed volumes based on historic TDM special access purchase levels, and do not allow the customer to “count” purchases of Ethernet circuits toward that minimum commitment.²⁸ The result is substantially higher effective wholesale input costs for the ILECs’ rivals that are seeking to expand their offerings using Ethernet inputs, which make it increasingly difficult for competitive providers to compete with the ILEC’s own retail Ethernet offerings.²⁹ A competitive provider faces these penalties even when it is replacing TDM services with purchases of Ethernet services that more than cover the shortfall, and even when the TDM tariff option under which the shortfall penalty is imposed includes circuit portability such that the wholesale purchaser’s spend is not tied to a specific end user location. In particular, *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

*****END HIGHLY CONFIDENTIAL*****³⁰

Accordingly, the Commission should find that it is unjust and unreasonable for ILECs to preclude competitive carriers’ purchase of Ethernet circuits from counting toward the attainment of tariff commitments. At a minimum, the Commission should institute a “fresh look” opportunity for tariff discount plans that provides customers the ability to reset their commitment quantities after each shortfall penalty assessment. However, even with a reset commitment level, the industry-wide transition to IP means that the shortfall penalties are simply being deferred to a later date rather than eliminated.³¹ Thus, long-term reform also should focus on removing shortfall penalties where the wholesale customer’s combined Ethernet and TDM purchases equal or exceed the TDM commitment level.

²⁸ See Windstream June 28, 2016 Comments at 67-68.

²⁹ See *id.*

³⁰ *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]
*****END HIGHLY CONFIDENTIAL***** *Id.* at 68.

³¹ See *id.* at 71-72 (*****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]
*****END HIGHLY CONFIDENTIAL*****).

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Ms. Marlene H. Dortch

August 22, 2016

Page 9 of 9

Please contact me if you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata

Henry Shi

Counsel to Windstream Services, LLC

cc:

Pamela Arluk
Irina Asoskov
Justin Faulb
Christopher Koves
Joseph Price
Marvin Sacks
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